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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 248

FRANK M. DELFINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, embodied in its order (App. A, *infra*, pp. 17–18; R. 219–220), is unreported.

JURISDICTION

The order of the Court of Claims was entered on January 25, 1963 (App. A, *infra*, pp. 17–18; R. 219–220). A motion for rehearing was denied on April 5, 1963 (R. 268). The petition for a writ of certiorari was filed on July 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim is barred by collateral estoppel, in light of prior adjudications in the

United States district court and the court of appeals.

2. Whether, irrespective of the issue of estoppel, the action of the Civil Service Commission, in sustaining the discharge of petitioner as a preference eligible under the Veterans' Preference Act of 1944, was supported by substantial evidence and in accordance with procedural requirements.

STATUTES INVOLVED

The Veterans' Preference Act of 1944, Section 14, as amended, 58 Stat. 390, 61 Stat. 723 (5 U.S.C. 863):

> No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance * * * in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission * * *.

Performance Rating Act of 1950, Section 6, 64 Stat. 1099 (5 U.S.C. 2005):

> Each performance-rating plan shall provide for ratings representing at least (1) satisfactory performance, corresponding to an efficiency rating of "good" under the Veterans' Preference Act of 1944, as amended, and under laws superseded by this Act; (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; and (3) outstanding performance, which shall be accorded only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

STATEMENT

1. THE UNDERLYING FACTS AND ADMINISTRATIVE PROCEEDINGS

Prior to his removal for cause on June 28, 1957, petitioner, a preference eligible under the Veterans' Preference Act, was employed as an electrician with the Department of the Air Force at the Cambridge Research Center, Lawrence G. Hanscom Field, Bedford, Massachusetts. On May 28, 1957, a Notice of Proposed Removal, signed by Colonel Woodrow W. Dunlop, the Installation Commander at Hanscom Field, was served on petitioner (Dft. Ex. 1, Tab. A).[1]

[1] Air Force Manual 40-1, Sec. 1, General Provisions, Par. 5b, dated July 30, 1951, provides that commanding officers of in-

This notice charged petitioner with (a) failure to carry out instructions promptly, (b) insubordination, and (c) violation of administrative regulations.

The notice also referred (Dft. Ex. 1, Tab. A) to a prior official reprimand on June 11, 1956, which stated that, as a result of repeated and intentional infractions by petitioner which created disturbances among shop personnel, petitioner had been reassigned to a different unit on July 1, 1956.

Petitioner was advised of his right to reply to the charges personally and in writing, advised of an official with whom he could discuss the case, and allowed 7 days within which to reply. (Dft. Ex. 1, Tab. A). On May 29, 1957, petitioner replied in writing to the charges (Dft. Ex. 1, Tab. B).

On June 6, 1957, petitioner was given a Notice of Final Decision signed by Colonel Dunlop in his capac-

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stallations are authorized by the Secretary of the Air Force to "appoint, assign, promote and demote, compensate, and separate civilian employees" (Dft. Ex. 17). Colonel Dunlop was designated by the Air Force as Installation Commander of Lawrence G. Hanscom Field from July 22, 1955, to August 21, 1957 (Dft. Ex. 18).

The respective exhibits have been lodged with the Clerk of this Court.

Specifications under (a) were that petitioner had failed, despite his supervisor's instructions, to perform promptly a weekly inspection of a power unit on August 31, 1956; to obtain transportation for the removal of certain equipment on November 26, 1956; and to clean a welder on January 17, 1957.

Charge (b) contained two specifications detailing acts of insubordination toward petitioner's civilian and military supervisors: petitioner refused to accept and sign for mechanical tools issued him, and he refused to report for a medical examination. In both instances petitioner demanded a written statement of authorization.

ity as Installation Commander, stating that petitioner's answer had been considered and was not deemed a satisfactory explanation of his conduct, and that he was being dismissed for "such cause as will promote the efficiency of the service." The removal decision was based on the three reasons given in the advance notice, and separation was effected as of June 28, 1957. Petitioner was advised of his right to appeal to the Civil Service Commission under Section 14 of the Veterans' Preference Act or to the Air Force through its grievance procedure, and advised of an official who could assist him in preparation of his appeal (Dft. Ex. 1, Tab C).

Petitioner did not avail himself of the Air Force grievance procedure, but, on June 7, 1957, appealed to the First Regional Office of the Civil Service Commission (Dft. Ex. 1; Tab D). After an investigation, that office conducted a hearing on July 9, 1957 (Dft. Ex. 1, Tabs E, F). At this hearing, petitioner was afforded opportunity to submit evidence and representations in support of his position; he availed himself of this opportunity (Dft. Ex. 1, Tab F). Prior to the hearing, petitioner's attorney withdrew and petitioner agreed that the hearing be carried on, petitioner acting as his own representative (Dft. Ex. 1, Tab H).

At the conclusion of the hearing, petitioner requested that it be reopened. In lieu of this, he accepted the Commission's offer permitting him to furnish additional evidence in writing. On August 14, 1957, through a new attorney, he submitted an additional statement arguing the evidence (Dft. Ex.

1, Tabs G, H, p. 3). The Commission held that the evidence substantiated charges (a) and (b), and found that petitioner's difficulties—

> were not due to personal prejudice and reprisal, but rather to his own resistance of and reluctance to submit to proper authority. [Dft. Ex. 1, Tab H, p. 10.]

The Commission held that petitioner's removal was warranted and was for such cause as would promote the efficiency of the service. It further found that the procedure of the Air Force conformed to the requirements of Section 14 of the Veterans' Preference Act of 1944 and Part 22 of the Civil Service Commission's regulations[3] (Dft. Ex. 1, Tab. H, pp. 9–10).

Petitioner, by letter dated September 11, 1957, took an appeal to the Commission's Board of Appeals and Review (Dft. Ex. 1, Tab I). The Board, on February 7, 1958, held that charges (a) and (b) were supported by the evidence and constituted proper cause for removal, and that the removal had been procedurally proper. After noting petitioner's satisfactory performance rating and awards for accepted suggestions, the Board stated, "It must be recognized, however, that these are evaluations of your work assignments, not your personal conduct. It is your conduct which is the basis for the separation." (Dft. Ex. 1, Tab J.).

[3] These regulations appear at 5 C.F.R. 22.201–22.205. And see, concerning appellate proceedings, 5 C.F.R. 22.501–22.607.

2. PRIOR COURT PROCEEDINGS

Following the decision of the Board, and prior to the instant action, petitioner instituted two suits based on the allegedly wrongful removal, both of which were decided against him. *DeFino* v. *Morgan*, D. Mass., No. 58–305–5 (dismissed, April 28, 1958, on defendant's motion; appeal dismissed on plaintiff's motion, September 10, 1958); *DeFino* v. *McNamara*, D.D.C., No. 880–58 (June 28, 1960, summary judgment for defendants), affirmed, 287 F. 2d 339 (C.A.D.C., 1961), certiorari denied, 366 U.S. 976, rehearing denied, 368 U.S. 872 (1961) (Dft. Exs. 2–31).

In the first action, petitioner sought an injunction restraining defendants from withholding his pay until defendants returned him to duty, and a declaratory judgment declaring that petitioner was entitled to be maintained as an employee at the research center (Dft. Ex. 2A). In substance, petitioner alleged that he was discharged in violation of the Veterans' Preference Act without cause and without the required 30-day notice, and in violation of the Performance Rating Act and implementing regulations, because he had received a satisfactory efficiency rating for the period in question (Dft. Ex. 2A, pars. 8–10). In an opinion dated April 28, 1958, the court dismissed plaintiff's complaint, finding that petitioner was separated from the service in accordance with the procedure prescribed by the Civil Service Commission (Dft. Ex. 3).

In his second action, filed in the District of Columbia on April 7, 1958 (Dft. Ex. 6), petitioner sought sub-

stantially the same relief as in the instant action (R. 44-45; Dft. Exs. 7, 8).[1]

Defendants' motion for summary judgment was granted upon the authority of *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970, and *Thomas* v. *Ward*, 225 F. 2d 958

[1] In the course of the district court proceeding petitioner made the following contentions:

(1) With respect to charges filed against petitioner alleging failure to carry out instructions, the orders were given without authority by officials who ordered petitioner to perform duties which were not part of the duties he was employed to perform (Dft. Ex. 7, par. 10);

(2) Petitioner was given a satisfactory rating as to work and conduct for the period of time during which the alleged improper conduct occurred; therefore, this was *res judicata* and no basis existed for filing the alleged and pretended charges (Dft. Ex. 7, par. 11);

(3) Petitioner was illegally dismissed on June 28, 1957 (Dft. Ex. 7, par. 12);

(4) The Board of Appeals and Review of the Civil Service Commission "refused, failed or neglected" to consider any legal points relative to charges being filed during a period of time when it had already been adjudicated that petitioner's work and conduct was satisfactory, and merely rubber stamped the Air Force decision; when the decision of the Board of Appeals and Review was presented to the Commissioners of the Civil Service Commission, although one Commissioner reviewing the file determined that the Board's decision should be reversed, the other two Commissioners refused to review petitioner's file, approving without justification the decision of the Board (Dft. Ex. 7, par. 13);

(5) Petitioner was discharged from his position by Colonel Dunlop, who had no authority and who left the installation shortly after the charges were filed; the authority to discharge petitioner rested with Commanding General Morgan and the latter never passed on the charges nor delegated the authority to Dunlop (Dft. Exs. 8, 9);

(6) Petitioner did not get a fair and honest hearing, since Colonel Dunlop, who signed the charges, acted in the capacity

(C.A.D.C.), certiorari denied, 350 U.S. 958 (Dft. Ex. 22). The Court of Appeals for the District of Columbia Circuit affirmed, noting (Dft. Ex. 25; 287 F. 2d 339):

> Appellant contends that a "satisfactory" rating received subsequent to the charged acts of insubordination demonstrates that his discharge did not satisfy the statutory criterion. But we have held that "though an employee's ordinary over-all performance of duties throughout the rating period may be rated as satisfactory he may still be guilty of conduct in connection with the execution of his official duties * * * which would justify dismissal * * * in the interest of promoting the efficiency of the service." *Thomas* v. *Ward*, 96 U.S. App. D.C. 302, 304, 225 F. 2d 953, 955 (1955), *cert. denied*, 350 U.S. 958 (1956). See also *Jones* v. *Hobby*, 96 U.S. App. D.C. 53, 223 F. 2d 345 (1955). Nor was there defect in the procedures employed here. *Ellis* v. *Mueller*, 108 U.S. App. D.C. 174, 280 F. 2d 722,

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of accuser, prosecutor and judge, ruling on the charges which he had previously filed against petitioner (Dft. Ex. 10);

(7) The removal notice stated that the decision was made in accordance with the provisions of Part 22 of the Civil Service regulations, whereas petitioner could only be removed in accordance with the provisions of Section 14 of the Veterans' Preference Act, 5 U.S.C. 863 (Dft. Ex. 11);

(8) The proceedings to remove petitioner were not in accordance with Air Force grievance procedure regulations applicable to employees at Cambridge Research Center; and, had they been followed, the decision in petitioner's case should first have been made by his superior (Dft. Ex. 11). The procedure relied on is quoted by petitioner but no citation is given for its source. However, the quoted portions are the same as AFCRCR 40-19 (Grievance Procedure), pars. 4(d), 6(c)(2) Ptf. Exhibit C.

cert. denied, 364 U.S. 883 (1960); *Harffett* v. *Summerfield*, 100 U.S. App. D.C. 85, 243 F. 2d 29, *cert. denied*, 353 U.S. 970 (1957).

Petitioner then filed his petition for a writ of certiorari in this Court (No. 1158–Misc., O.T. 1960) presenting substantially the same contentions as he had raised in the district court and court of appeals and later repeated in the instant action (R. 1–45; and see Argument *infra*, pp. 11–12). Certiorari was denied (366 U.S. 976; rehearing denied, 368 U.S. 872).

3. THE INSTANT CASE

In this proceeding, commenced on January 18, 1962, the Court of Claims granted summary judgment for the United States upon the basis that petitioner "is collaterally estopped to seek relief in [the Court of Claims] due to the previous decisions in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit" (App. *A*, *infra*, p. 17; R. 219). The Court of Claims further concluded that petitioner "has failed to show that the action of the Civil Service Commission was arbitrary, capricious or unsupported by substantial evidence" (App. A, *infra*, p. 17; R. 219).

ARGUMENT

1. The essentially factual questions raised by petitioner clearly do not warrant further review in this Court. The court below has held that prior adjudications in the case precluded petitioner's attempted re-

litigation of the same issues in the instant action. That ruling is plainly correct.

The effect of the decisions in other courts, particularly in the District Court and the Court of Appeals for the District of Columbia Circuit, was to determine that petitioner's removal was proper, for such cause as will promote the efficiency of the service, and in accordance with Section 14 of the Veterans' Preference Act and Part 22 of the Civil Service Commission's Regulations. In affirming, the Court of Appeals stated: "Nor was there defect in the procedures employed here," citing *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970 (1957); and *Ellis* v. *Mueller*, 280 F. 2d 722 (C.A.D.C.), certiorari denied, 364 U.S. 883 (1960).[5] And it expressly rejected petitioner's contention that his satisfactory performance rating precluded his removal, given "conduct in connection with the execution of his official duties * * * which would justify dismissal * * * in the interest of promoting the efficiency of the service."

It is clear that petitioner has tried to relitigate substantially the same case.[6] While petitioner did not specifically contend before the District Court, as he does in the instant action, that he was denied a hearing in person after a written request, that the notice of proposed removal and notice of removal were signed the

[5] The district court in Massachusetts was equally decisive: "All the steps that were taken to separate him from the service at Bedford were the steps prescribed by the Civil Service." (Dft. Ex. 3.)

[6] See the detailed comparisons in the government's Motion for Summary Judgment (R. 83–84, printed pagination 31–32).

same day pursuant to some sort of conspiracy, that one Captain Sleeth interfered in some undefined way with the hearing before the Civil Service Commission, or that the Commission refused to call Captain Sleeth and Colonel Dunlop as witnesses, petitioner nevertheless did allege and contend, in the district court, that there were numerous infractions of his rights by the agency and the Commission and specifically alleged that he was illegally dismissed. Moreover, the government there denied petitioner's allegations, opposed the numerous contentions and specifically alleged that no legal rights of petitioner were violated. Accordingly, petitioner's rights in regard to his removal were clearly and broadly placed in issue.

In the circumstances, the doctrine of collateral estoppel was appropriately applied by the Court of Claims. See *Commissioner v. Sunnen*, 333 U.S. 591, 601–602 (1948).[1] Petitioner has had his day in court.

[1] Petitioner attacks the decisions of the district court and the court of appeals, and the refusal of this Court to grant certiorari, alleging some sort of chicanery on the part of petitioner's counsel and defense counsel (R. 22, 24, 26), alleging that the court of appeals did not hear the case on appeal or make the recorded ruling (R. 29), and that the case was kept away from the Supreme Court (R. 30). But petitioner cannot be permitted to create triable issues in a new court by making vague and unspecific allegations concerning the conduct of attorneys. Had there been any substance to these assertions, then the proper avenue for relief was in the district court. See Rule 60, F.R. Civ. P.

Petitioner also contends that the question of Dunlop's lack of authority was not decided by the district court (R. 28, 29), but, in this, he is in error (Dft. Ex. 31; see also Dft. Exs. 14, 24).

2. Moreover, if one were to assume that petitioner's claim were not barred by estoppel, he could not prevail. For, as the Court of Claims ruled, petitioner's removal from government employment was properly sustained by the Civil Service Commission upon the basis of substantial evidence and sound procedures (R. 219–220).

Petitioner's principal complaint here, as in the various courts below, is that the "satisfactory" performance rating, given him by his supervisor subsequent to the charged acts of insubordination, precludes his dismissal. But, while an employee's ordinary over-all performance of duties in a performance rating period may be rated satisfactory, he may still be guilty of conduct in connection with the execution of his duties, either in particular instances or in a particular aspect of his tasks, which would justify dismissal in the interest of promoting the efficiency of the service. This was true in petitioner's case. Both the Court of Appeals for the District of Columbia Circuit and the Court of Claims have consistently held that there is nothing in the Performance Rating Act of 1950 which requires the giving of an "Unsatisfactory" performance rating as a condition precedent to removal to promote the efficiency of the service, under either the Lloyd-LaFollette Act, 5 U.S.C. 652, or the Veterans' Preference Act. *DeFino* v. *McNamara*, 287 F. 2d 339 (C.A.D.C.), certiorari denied, 366 U.S. 976; *Thomas* v. *Ward*, 225 F. 2d 953 (C.A.D.C.), certiorari denied, 350 U.S. 958; *McGinty* v. *Brownell*, 249 F. 2d 124 (C.A.D.C.), certiorari denied, 356 U.S. 952; *Jones* v. *Hobby*, 223 F.

2d 345 (C.A.D.C.); *DeBusk* v. *United States*, 132 Ct. Cl. 790, certiorari denied, 350 U.S. 988;[8] *Hoppe* v. *United States*, 136 Ct. Cl. 559, certiorari denied, 355 U.S. 816; *Misuraca* v. *United States*, 135 Ct. Cl. 387.[9]

Equally lacking in merit is petitioner's contention that his dismissal was procedurally defective. As a preference eligible, his procedural rights were governed by the Veterans' Preference Act of 1944 and the implementing regulations promulgated by the Civil Service Commission. All rights thereunder were accorded petitioner. Petitioner had the right to pursue the grievance procedure offered by the Air Force, but he did not choose to invoke it. He asked for, and received, his administrative review by the First Civil Service Region and by the Board of Appeals and Review of the Civil Service Commission,

[8] In the *DeBusk* case, as here, the employee received a "Satisfactory" performance rating subsequent to the acts of insubordination which were made the basis of his dismissal. The Court of Claims held that the employee could be removed to promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act, regardless of the fact that he had not been given an "Unsatisfactory" performance rating under the Performance Rating Act of 1950.

[9] *Lettl* v. *Wilson*, 148 F. Supp. 215 (D.D.C.), relied on by petitioner (Pet. 13), is not in point. There, an employee of the Army was given notice of an "Unsatisfactory" performance rating under the Classification Act of 1923 (later superseded by the Performance Rating Act of 1950). Subsequently, he was given a within-grade pay raise, which, under applicable Army regulations, served to cancel the warning notice. The court simply held that the Army must abide by its own regulations. Additionally, it is to be noted that the *Lettl* case involved a removal for failure to attain a satisfactory rating, not to promote the efficiency of the service, as is the case here. The cases cited in the text point out that these two classes of dismissal are distinct.

both of whom found that the Air Force had fully complied with the procedural safeguards afforded a preference eligible under the statute and regulations. Two district courts, one court of appeals, and now the Court of Claims have reached the same conclusion. Petitioner's arguments to the contrary are insubstantial.[10]

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[10] Petitioner's arguments involve extensive portions of the record and exhibits for full exposition of their inaccuracies and error. The details of the corrections appear in the government's "Defendant's Motion for Summary Judgment" (R. 83, ff.) and in "Defendant's Reply to Plaintiff's Opposition" (R. 179, ff.) in the Court of Claims and will not be repeated *in extenso* here. Petitioner, for example, despite his election of Civil Service Commission appeal rather than Air Force procedures (upon clear notice of the nature of that election, Dft. Ex. 1, Tab C), now confuses aspects of the latter procedures with the former, and complains (Pet. 16) of the absence of certain Air Force procedures. These were obviously not to be accorded to him, in light of his own election of a different review procedure. See more extensive discussion at R. 201–203 (Reply to Petitioner's Opposition, *supra*, printed pagination pp. 17–19). Petitioner, under similar misapprehension, complains (Pet. 15) of a lack of personal hearing before the commander of the installation, but ignores his own failure to elect such hearing or to complain, seasonably, of the lack thereof, in the extensive administrative review. See Dft. Ex. 1, and R. 71 (Motion, *supra*, printed pagination, p. 19); R. 194–197 (Reply, *supra*, printed pagination, pp. 10–13). Further instances of petitioner's assumptions of his own version of facts, or interpretations of decisions or enactments, appear in his petition, but their lack of substance or merit is patent upon the record without need of further emphasis here.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

APPENDIX

ORDER OF THE COURT OF CLAIMS ENTERED ON JANUARY 25, 1963

No. 20–62

FRANK M. DEFINO

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion for summary judgment, filed June 11, 1962, and plaintiff's motion for trial and alternative a subsequent motion for final judgment in favor of the plaintiff and motion for court order, filed July 11, 1962. Upon consideration thereof, together with the opposition thereto, oral argument of plaintiff, pro se, and counsel for defendant and the briefs of the parties, it is concluded that plaintiff is collaterally estopped to seek relief in this court due to the previous decisions in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. It is further concluded that plaintiff has failed to show that the action of the Civil Service Commission was arbitrary, capricious or unsupported by substantial evidence, and

It is ordered, That defendant's motion for summary judgment be and the same is granted, plaintiff's motion for trial and alternative a subsequent motion for final judgment in favor of plaintiff and

motion for court order are denied, and plaintiff's petition is dismissed.

BY THE COURT,

MARVIN JONES,
Chief Judge.

Judge Davis took no part in the consideration and decision of this case.

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